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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982.

COMPUTER SCIENCES CORPORATION, JOHN W. LUKE, ERWIN L. ALLEN, THOMAS A. MARTI, NORMAN W. DERRICK, PETER C. LOUX, and HERBERT G. BLECKER, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a district court correctly dismissed

(a) allegations of "racketeering" brought pursuant to the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"), 18 U.S.C. § 1962, against officers and employees of a nationally known and publicly held corporation who are alleged to have submitted, entirely on the corporation's behalf, false claims to the United States on a long-term service contract,[1] and

(b) allegations pursuant to RICO and the Mail and Wire Fraud laws, 18 U.S.C. § 1341, 1343, against a corporation and its officers and employees where, in order to circumvent Congress' exclusion of false claims from the list of predicate offenses upon which a RICO claim may be based, prosecutors characterized as mail and wire fraud conduct that was also specifically charged as a violation of the False Claims Act, 18 U.S.C. § 287.

2. Whether the violation of Rule 6(d) of the Federal Rules of Criminal Procedure by repeated, unreprimanded intrusions into ongoing grand jury proceedings by individuals under control of the prosecutor warranted the dismissal without prejudice of a resulting indictment.

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[1] Because the RICO charges have been dismissed against Computer Sciences Corporation ("CSC"), the corporation does not join this petition insofar as it contends that RICO counts against the individual defendants should have been dismissed. CSC does join with the individual petitioners in asserting (i) that the mail fraud and wire fraud laws are not violated by conduct specifically covered by the false claims provision and (ii) that the district court properly dismissed all counts because of repeated improper intrusions into the secrecy of the grand jury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-18a, *infra*) was filed on June 16, 1982, and is not yet reported. The order and opinion of the district court (Pet. App. C, pp. 21a-63a, *infra*) was filed on March 5, 1981, and is reported at 511 F. Supp. 1125.

JURISDICTION

The decision of the court of appeals was issued on June 16, 1982. A timely petition for rehearing was denied on September 27, 1982. Pet. App. B, pp. 19a-20a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

The pertinent sections of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-64, the False Claims, Mail Fraud, and Wire Fraud Acts, 18 U.S.C. §§ 287, 1341, and 1343, and Rule 6(d) of the Federal Rules of Criminal Procedure are reproduced at Pet. App. E, pp. 67a-73a, *infra*.

STATEMENT

This case concerns charges of racketeering, fraud and submission of false claims made against Computer Sciences Corporation ("CSC"), a corporation whose stock is traded on the New York Stock Exchange, and six individuals who were involved in the administration of various aspects of a contract between CSC and the General Services Administration ("GSA"), under which all federal agencies were provided access, on a time-sharing basis, to a nation-wide teleprocessing system. After extensive briefing and oral argument, District Judge Richard L. Williams dismissed the 57-count indictment, which contained three charges based upon the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, *et seq.*, 40 counts charging mail fraud and wire fraud (18 U.S.C. §§ 1341, 1343), and 14 counts charging the submission of false claims (18 U.S.C. § 287). R. 41.[2] The court of appeals reversed the district judge's order and remanded the case for trial against all defendants on all counts other than RICO counts insofar as they charged CSC and one count that was concededly time-barred.

The indictment was supported principally by allegations concerning CSC's method of billing GSA for use of the teleprocessing network. The governing contract—an elaborate document consisting of hundreds of pages—contained complex provisions for the computation of user fees. Because the computer network could be used in thousands of different ways,

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[2] "R." refers to the Appendix filed in the court of appeals.

fees were calculated on the basis of "System Resource Units," which were an amalgam of computer resource functions such as storage of information, time, retrieval, use of the "central processor," and other specified elements. An "algorithm" was established to compute how many "System Resource Units" were used in each job. That "algorithm" measured the consumption of each element and assigned weights to each component in the over-all computation.

GSA awarded CSC the contract in 1972, after a lengthy competitive procurement process in which comparative cost and technical capability among various interested companies was evaluated by GSA's cost and technical teams. The contract was concluded at the close of its fourth renewal period in 1977. In late 1978 the Department of Justice initiated an investigation into whether CSC had overbilled the government.

CSC cooperated fully in the grand jury investigation. It made records available and produced its officers and employees, unrepresented by counsel, for interviews and grand jury appearances. Unknown to CSC, on several occasions during the grand jury proceedings, individuals assigned to the prosecutors' office, as well as other law-enforcement and unidentified personnel, entered the grand jury room while witnesses were testifying. These intrusions are discussed in more detail at pp. 18-19, *infra*.

On October 8, 1980, the instant indictment was returned. Its principal allegation, as described by the government, was "that the defendants fraudulently overcharged the government for computer processing services, in excess of the fixed price authorized by the contract." Brief for the United States, 4th Cir., Nos. 81-5053 and 81-5099, pp. 2-3. This was accomplished, according to the indictment, by unauthorized adjustments of the weights assigned to the different elements in the "algorithm" used to measure "System Resource Units." CSC has consistently maintained that its adjustments of the weights in the algorithm were encompassed by the governing contract. The indictment also charged in six of its counts that a

particular computer program provided to GSA under the contract had been misrepresented to GSA as "a substantially improved version of a program previously provided to GSA at a lower price." *Id.* at 3.

Rather than making these allegations straightforwardly as charges solely under 18 U.S.C. § 287, the False Claims Act, the prosecutors alleged that CSC's "fraudulent overcharges" also constituted mail fraud because CSC was paid by checks transmitted through the mails. And since CSC's teleprocessing network transmitted signals across state lines, wire fraud charges were also included in the indictment.

Having charged the defendants with violations of 18 U.S.C. §§ 1341 and 1343, the prosecutors also brought their case within RICO, which specifies mail and wire fraud, *but not the submission of false claims*, as "predicate offenses" for racketeering charges. On this ground, a highly inflammatory and potentially prejudical allegation that a GSA employee had been bribed in 1971 with an offer of employment by CSC, which would have been barred by the applicable statute of limitations, was included in the indictment as an act within the ten-year period covered by RICO.

After considering briefs and hearing legal argument, Judge Williams ruled initially that he would dismiss all counts of the indictment except for the false claims charges. R. 41. He explained that "Congress did not intend to have mail fraud tacked onto all false claims charges, and certainly did not intend to have false claims charges become the basis for RICO charges." R. 104; Pet. App. C at 40a, *infra*.

Additional hearings were then held on other defense motions. Judge Williams subsequently dismissed, without prejudice to reindictment, the remaining fourteen counts of the indictment on the ground that unauthorized intrusions into the grand jury proceedings required that remedy. He also dismissed all counts against Norman Derrick with prejudice because of prosecutorial misconduct. R. 128; Pet. App. C at 63a n.13, *infra*.

The court of appeals reversed. Acknowledging that Rule 6(d) of the Rules of Criminal Procedure had been violated by "intruders . . . apparently under the control of the prosecutors, who were obviously not diligent in keeping the sanctity of the grand jury room inviolate" (Pet. App. A at 8a, *infra*), the court said that only if there were "demonstrable prejudice" would dismissal of the indictment be "appropriate." Pet. App. A at 6a, *infra*.

The court of appeals also reversed Judge Williams' dismissal of the mail fraud, wire fraud and RICO counts on the ground that there is no "mutual exclusivity" between those laws and the False Claims Act. Pet. App. A at 10a, *infra*. It did so despite acknowledging that the petitioners "do not immediately appear to fit a category against whom the act [RICO] was generally considered to be directed" and observing that it was "tempting" to rule that RICO is inapplicable to such circumstances. Pet. App. A at 15a, *infra*.

The court of appeals did, however, rule that a prosecution could not be brought under 18 U.S.C. § 1962 against an entity that is named as both a defendant and the affected "enterprise" specified in the federal law. Pet. App. A at 17a, *infra*. For this reason, the court of appeals sustained the dismissal of Counts 1-3 against CSC, but reinstated the RICO counts against the individual defendants. The court of appeals also reversed the dismissal with prejudice of the charges against Norman Derrick. Pet. App. A at 12a-14a, *infra*.

REASONS FOR GRANTING THE WRIT

In its present posture, this case raises important substantive and procedural issues that relate to the integrity of the administration of federal criminal law and which are subject to conflict and disagreement among federal courts. After full hearings and ample briefing, a thoughtful district judge concluded that the prosecutors had overreached by:

(1) invoking RICO, a recently enacted law that was patently not intended by Congress to reach the kind of corporate misconduct alleged in this indictment;

(2) "pyramiding" routine allegations of false claims into a series of mail frauds and wire frauds in order to be able to bring RICO charges that would otherwise not be an available basis for prosecution; and

(3) permitting personnel under the prosecutors' supervision to make improper visits to the grand jury room while witnesses were testifying, and making no effort to reprimand those guilty of such invasions or to prevent their recurrence.

The district court's ruling, which does not prevent the prosecutors from seeking to re-indict the corporation and five defendants on false claims charges, was an effective warning to prosecutors (1) not to burden the federal courts with extravagant theories expanding federal criminal statutes far beyond their original intent, and (2) not to conduct federal grand jury proceedings so carelessly that the grand jury's independence and confidentiality are compromised. The court of appeals' reversal has the opposite effect. It invites waves of novel RICO claims, both criminal and civil, and effectively repeals the False Claims Act by converting every false claim into a form of mail fraud. The court of appeals' ratification of the grand jury proceedings—despite blatant violations of the rule of grand jury secrecy prescribed by the Federal Rules of Criminal Procedure—conflicts with the remedies heretofore applied by other federal courts for violations of Rule 6(d) and nullifies its protections. The standard applied by the court below, which rests on a patent misapplication of this Court's recent decision in *United States* v. *Morrison*, 449 U.S. 361 (1981), opens the door to proceedings that jeopardize the independence of the grand jury.

I

NEITHER RICO NOR THE MAIL AND WIRE FRAUD LAWS APPLY TO THE TYPE OF CONDUCT ALLEGED IN THE INDICTMENT

A. The prosecution's legal theory overrides a statutory limitation on RICO and perverts RICO's statutory policy of preventing the infiltration of legitimate businesses by criminal elements.

When stripped to its precise factual allegations, this indictment accuses officers and employees[3] of a nationally renowned corporation of fraudulently overcharging the United States on a service contract for and on behalf of the corporation. These allegations of overbilling state a classic False Claims Act violation. Since false claims violations are not RICO predicates, however, the prosecutors in the instant case characterized the alleged overbillings as mail and wire frauds, based on the fact that the United States pays all its bills by mail and that the computer processing involved interstate wire transmissions. They thereby "pyramided" the overbillings into RICO violations, thus avoiding the limitations on RICO which Congress had established by carefully defining the requisite predicate offenses.

The prosecutors assert that the *literal* terms of the 1970 law designed to reach "racketeering" have been satisfied by this

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[3] Five of the six individual defendants were officers or high-ranking employees of CSC during the relevant period. John W. Luke was a member of CSC's Board of Directors, a Vice President of CSC, and President of CSC's Data Services Group. Erwin L. Allen served in various senior executive positions. Thomas A. Marti was a Financial Analysis Manager, Norman W. Derrick served as a Director of Business Analysis, and Peter C. Loux was a customer sales representative with CSC. The sixth defendant, Herbert G. Blecker, is President of Icarus Corporation, a company that develops and markets software products and that provided programs to CSC for use in CSC's teleprocessing service.

indictment. "Racketeering activity," as defined in 18 U.S.C. § 1961(a), includes mail and wire fraud, and CSC's Infonet Division has, according to the prosecutors, been "conducted" by the individual defendants in a manner that includes acts of mail and wire fraud. But in construing a statute it is a " 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' " *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 201 (1979), *Connell* v. *Plumbers & Steamfitters*, 421 U.S. 616, 628 (both quoting *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 469 (1892)). The obvious weakness in the prosecutors' position is that if the statute is thus implemented literally, Congress' purpose is perverted in at least two ways:

First, this application of RICO reads out of the statute Congress' deliberate exclusion of false claims from its enumeration of predicate offenses.

Second, this application of RICO converts a statute designed to protect legitimate businesses against underworld infiltration and abuse into a weapon to be used against such legitimate businesses and their officers if, in carrying out a company's routine business operations and in furthering its interests, those officers misstep and engage in criminal activity.

In 1981, when this Court was considering whether RICO's expansive language could be applied to a wholly illegitimate "enterprise," the Solicitor General recognized in his brief that given the broad literal reach of RICO, "extreme cases can be conjured up." He assured the Court, however, that federal prosecutors would not routinely invoke RICO whenever its words could be satisfied, but would exercise "sound discretion . . . in accordance with the facts and circumstances of . . . [each] particular case." Brief for the United States, *United States* v. *Turkette*, No. 80-808, pp. 24-25, n.20. The indictment in this case belies those assurances.

Various courts of appeals have warned against "pyramiding" and other abusive and excessive use of RICO. *See, e.g., United*

States v. *Fine*, 644 F.2d 1018, 1023, n.15 (5th Cir.), *cert. denied*, 102 S.Ct. 669 (1981); *United States* v. *Guiliano*, 644 F.2d 85, 88 (2d Cir. 1981) ("We doubt that Congress expected [RICO] to be used in circumstances where an embezzlement can be escalated into a federal bankruptcy fraud, and then joined with another bankruptcy fraud to form an alleged pattern of racketeering activity."); *United States* v. *Huber*, 603 F.2d 387, 395-396 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *cf.*, *United States* v. *Aleman*, 609 F.2d 298, 306 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). In this case, the court of appeals acknowledged that the charges in the indictment did not "immediately appear to fit a category" designed to be covered by RICO. Pet. App. A at 15a, *infra*. Nonetheless, it reversed the district court's dismissal of the indictment and thereby signaled to prosecutors that the bringing of such excessive criminal charges is permissible.

Nor should it be thought that the proper scope of RICO can be reviewed later in this case if a trial results in a conviction. Such a view fails to consider the immediate and severe burden imposed by these prosecutions on the federal court system and on targets of pending and future criminal allegations. As complex and time-consuming as mail or wire fraud prosecutions may now be, they will become even longer and more difficult, and will be more sharply contested, in view of the drastic consequences of a RICO conviction. The mere invocation of the words "racketeer influenced" will have an inflammatory effect on most juries, and use of RICO will allow a prosecutor to bring charges before the jury that would otherwise be time-barred. Many defendants will be unfairly prejudiced if they are forced to stand trial on RICO counts that should never have been brought.

Another substantial consequence of permitting a prosecution of this kind is its impact on potential *civil* RICO cases. 18 U.S.C. § 1964 grants a civil remedy, with treble damages and attorneys' fees, to "any person injured in his business or property" by a RICO violation. This provision is being increasingly invoked by imaginative lawyers as a basis for bringing into

federal court a host of unusual civil claims, many of which would ordinarily be cognizable only in state courts.[4] If a criminal RICO case can proceed against officers and employees of a company like CSC merely because they are charged with having submitted two or more false claims on behalf of the corpora-

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[4] Indeed, a review of recent federal court cases suggests that the subject-matter and scope of civil RICO claims are limited only by the imaginations of ingenious plaintiffs' attorneys. Civil RICO claims have been brought by: claimants to leadership of a Jewish Hasidic dynasty against an opposing group of claimants, *see Beth Yitzhok* v. *Briskman*, No. CV 82-2066 (E.D.N.Y. filed July 15, 1982); a disgruntled member of a church charging she was harassed by the church leadership, *see Van Schaick* v. *Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125 (D. Mass. 1982); purchasers of allegedly defective low pressure, high speed, flexible coupling units installed in the propulsion units of sailing vessels, *see Waterman S.S. Corp.* v. *Avondale Shipyards, Inc.*, 527 F. Supp. 256 (E.D. La. 1981); purchasers of real estate claiming that seller failed to reveal the existence of a prior mortgagee, *see Salisbury* v. *Chapman*, 527 F. Supp. 577 (N.D. Ill. 1981); bank customers alleging they were charged excessive interest rates on loans, *see Kleiner* v. *First Nat. Bank*, 526 F. Supp. 1019 (N.D. Ga. 1981); municipal employees claiming that they were forced as a condition of employment to contribute to a political party, *see Cullen* v. *Margiotta*, 618 F.2d 226 (2d Cir. 1980); customers charging that a telephone answering service fixed prices, *see Barr* v. *WUI/TAS*, 66 F.R.D. 109 (S.D.N.Y. 1975); plaintiffs attempting to "exploit the vague language of the civil provision of the federal anti-racketeering statute in an attempt to recoup investment losses," *Mauriber* v. *Shearson/American Express*, No. 82 Civ. 1802 (S.D.N.Y. Aug. 27, 1982); the daughter of a deceased claiming she was deprived of her inheritance by the deceased's widow, *see Gunther* v. *Dinger*, No. 81 Civ. 6985 (S.D.N.Y. April 30, 1982); and at least two women charging that their former husbands illegally deprived them of matrimonial property, *see Erlbaum* v. *Erlbaum*, Fed. Sec. L. Rep. [CCH] ¶ 98,772 (E.D. La. July 13, 1982); *Alton* v. *Alton*, No. 82 Civ. 0795 (S.D.N.Y. July 8, 1982).

tion, there is no conceivable limit to the kinds of civil cases the lower courts will have to face in the very near future.[5]

By the time this case would reappear on the Court's docket after a trial, the damage to the dockets of federal courts will have been done. Lawsuits with bizarre claims will have been filed and, in light of this decision, permitted to go to trial. The proper bounds of RICO should be established here and now before it is the subject of further abuse.[6]

B. The prosecution's legal theory improperly escalates all false claims into mail and wire fraud charges.

The prosecutors managed to bring their allegations within RICO's literal terms only because they creatively character-

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[5] We do not believe it is necessary at this juncture to verbalize *precisely* where the line must be drawn between conduct that is within the reach of RICO and conduct outside the racketeering law. That question can be fully canvassed in briefs on the merits. It suffices for present purposes to note that RICO surely should not apply (1) where the individuals have not "infiltrated" the corporation or surreptitiously assumed control of it, (2) where the alleged "racketeering" is not a deviation in kind from the corporation's past legitimate business activities, and (3) where the alleged criminal conduct benefits the corporation, and not the individuals charged with "racketeering."

[6] An instructive parallel is the experience this Court has had with the issue of official immunity for torts allegedly committed by Cabinet-level personnel. The Court initially set down a qualified immunity standard containing both subjective and objective components. *See Butz* v. *Economou*, 438 U.S. 478 (1978). That standard led to inequitable consequences to defendants, which were described in this Court's opinion in *Harlow* v. *Fitzgerald*, 102 S.Ct. 2727 (1982). As a result, the standard was modified to eliminate the subjective element. *Id.* at 2737-2738. This after-the-fact adjustment did not, of course, eliminate the adverse consequences suffered by defendants who had incurred great personal expense and hardship in the interim.

ized the defendants' submission of allegedly false claims—which the government itself described in its appellate brief as "fraudulent overcharges"—as mail and wire fraud. In order to establish a RICO offense, the government must prove the existence of two "predicate offenses" within the previous ten years. Congress included mail fraud and wire fraud among those offenses upon which a RICO offense can be based. *See* 18 U.S.C. § 1961(1). But Congress deliberately excluded violations of the False Claims Act from the list of predicate offenses under RICO. The prosecutors knew, therefore, that if they merely charged the alleged submission of false bills to the government as false claims, they could not bring any RICO charges. The prosecutors attempted to evade the limitations of RICO by charging that this alleged conduct constituted mail and wire fraud.

District Judge Williams recognized this as an impermissible prosecutorial ploy, and he dismissed the mail fraud, wire fraud, and RICO counts because "Congress did not intend to have mail fraud tacked onto all false claims charges, and certainly did not intend to have false claims charges become the basis for RICO charges." R. 104, Pet. App. C at 40a, *infra*. This "pyramiding" of fraud and racketeering charges on a routine false claims case was impermissible.

The court of appeals has now issued an invitation to prosecutors to evade the predicate offense limitation on RICO. Since the government is required by law to pay all bills by mail (Comptroller General Decision A-83685, Mar. 12, 1937), the decision below will tempt prosecutors to employ mail fraud allegations routinely as a detour around the statutory exclusion of false claims from the list of predicate offenses. Nor is the "pyramiding" option confined to the false claims context. Although tax violations are not specifically chargeable under RICO, under the theory relied upon by the prosecutors in this case, an individual taxpayer who files false tax returns by mail in two of ten years for a family corporation could be indicted as a "racketeer." And the Court of Appeals for the Second Circuit has noted the comparable danger that simple embezzlement

"can be escalated into a federal bankruptcy fraud, and then joined with another bankruptcy fraud to form an alleged pattern of racketeering activity" under RICO. *United States* v. *Guiliano*, 644 F.2d 85, 88 (2d Cir. 1981).

Furthermore, in reversing the district court, the court of appeals ignored guiding principles announced by this Court, misinterpreted the legislative history of the mail and wire fraud laws, and squarely rejected a persuasively reasoned decision by Judge Edward Weinfeld of the Southern District of New York.

(i) *This Court's Guidelines.*—In *Simpson* v. *United States*, 435 U.S. 6 (1978), and in *Busic* v. *United States*, 446 U.S. 398 (1980), this Court reaffirmed "the principle that gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern . . ." 435 U.S. at 15; *see* 446 U.S. at 406 ("a more specific statute will be given precedence over a more general one. . ."); The conduct alleged in this indictment violated the "specific" statute, first enacted in 1863 (12 Stat. 696), prohibiting the submission of false claims to the United States. The more "general" statutes, which imposed criminal penalties for all kinds of fraud involving use of the mails or the interstate wires, were enacted in 1872 (17 Stat. 323) and in 1952 (66 Stat. 722). Under the principles of *Simpson* and *Busic*, the "specific" false claims law must be "given precedence" over the more "general" mail and wire fraud laws. Accordingly, the offenses alleged in this indictment may be charged under the specific statute, and are not subject to the general laws.

If that were not the rule, the more "specific" statute would effectively be written off the statute books. As a result of an administrative regulation requiring the United States to pay *all* its contractors through the United States mails (Department of Treasury, Division of Disbursement Procedure Manual, Part 3 at 34-24; Comptroller General Decision A-83685, March 12, 1937), the prosecutors' theory means that the 1863 false claims law (which is presently codified at 18 U.S.C. § 287)

is now duplicated by the 1872 mail fraud law. Such a result is inconsistent with governing principles of statutory construction. *See Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 560 (1963); *cf. Parr* v. *United States*, 363 U.S. 370, 391 (1960).

The court of appeals mistakenly believed that it could affirm the district court's ruling only by concluding that the indictment violated the rule of *Blockburger* v. *United States*, 284 U.S. 299 (1932). This was a fundamental misunderstanding of *Blockburger*. *Blockburger* provides a constitutional rule regarding double jeopardy and states one of several guidelines for statutory construction. But *Blockburger* is not—as the court of appeals apparently believed—the exclusive means of divining Congressional intent. *See Simpson* v. *United States*, 435 U.S. at 12. In this case, the rule of statutory construction adopted by this Court in *Simpson* and *Busic* establishes that Congress did not intend alleged false claims to be tried as mail fraud.

(ii) *The Legislative History of the Mail Fraud Law.*—The mail and wire fraud laws, when enacted in 1872 and 1952, were designed to reach with criminal sanctions various kinds of frauds that had not previously been subjected to federal criminal law. Chief Justice Burger, joined by Justice White, characterized the mail fraud law in his own opinion in *United States* v. *Maze*, 414 U.S. 395, 405-06 (1974), as "a stop-gap device to deal on a temporary basis" with newly invented forms of fraud "until particularized legislation can be developed and passed to deal directly with the evil." *See also* 414 U.S. at 405 (opinion of the Court). That view of mail fraud—as a means of using federal law enforcement on a "stop-gap" basis to punish conduct that was not previously prohibited—is supported by the sparse legislative history of the 1872 law. There was no suggestion whatever that the submission of false claims to the government—which had been rendered criminal by a law enacted nine years earlier—was to be covered, if the mails were used, by the later statute.

The court of appeals demonstrated that it totally misunderstood petitioners' argument when it commented (p. 9a n.10,

infra) that "it requires a great stretch of imagination to attribute an intent to Congress in 1863 prospectively to render inapplicable to frauds against the government any statute which might later be enacted by a subsequent Congress or Congresses." It is not Congress' intent in 1863 that renders the mail fraud provision inapplicable. This result is mandated by Congress' intent *in 1872* not to duplicate any previously enacted law.

(iii) *Conflict with United States* v. *Henderson*.—The court of appeals acknowledged that its reversal of Judge Williams' decision on this issue conflicted with the decision of Judge Edward Weinfeld of the Southern District of New York in *United States* v. *Henderson*, 386 F. Supp. 1048 (S.D.N.Y. 1974). *See* Pet. App. A at 11a n.13, *infra*. In *Henderson*, the district court dismissed counts of an indictment that charged an alleged tax evader with mail fraud because he had sent fraudulent documentation through the mails. Judge Weinfeld reviewed the legislative history of the mail fraud law and concluded that the mail fraud statute was not intended to cover a scheme to defraud the government. He said, in language directly applicable to this case (386 F. Supp. at 1054):

> [T]he mail fraud counts [were a means of] pyramiding sentences in the event of a conviction . . . [and] were impermissibly used in an attempt to reach the same offenses and to increase penalties in the event of conviction, beyond the intent of Congress.

In this case there was, of course, an additional impermissible motive beyond the "pyramiding" of offenses; the prosecutors were trying to bring the defendants' conduct under RICO, and they could do so only if they could charge mail fraud.

The Fourth Circuit refused to follow the *Henderson* decision in this case because it had been "flatly rejected" by the Ninth Circuit in *United States* v. *Miller*, 545 F.2d 1204, 1216 n.17 (9th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977). The Second Circuit, however, has not "rejected" the *Henderson* decision, and Judge Friendly, in *United States* v. *Mangan*, 575 F.2d 32, 48-49 (2d Cir.), *cert. denied*, 439 U.S. 931 (1978), while leaving

"to another day" the precise issue in *Henderson*, "expressed misgivings over the Government's use of the mail fraud statute as a basis for additional counts in an indictment the gravamen of which was the violation of other federal criminal statutes . . . ." *See also United States* v. *Dixon*, 536 F.2d 1388, 1398-1401 (2d Cir. 1976).

The court that decided *Henderson*—the Southern District of New York—is a commercial center that is a frequent venue for mail and wire fraud prosecutions. The issue presented by this case—whether allegations of fraudulent activities that constitute crimes covered by more specific federal laws are also covered by the mail fraud statute—is likely to recur frequently in New York City. A division of opinion between a highly respected federal judge in New York and the courts of appeal in California and Richmond has practical consequences similar to those of a conflict among circuits. This Court should grant certiorari and resolve that conflict so that the same principles of law will be applied in Los Angeles as in New York.

We note, in conclusion, that although this Court has had occasion to consider—and to deny—a number of petitions challenging RICO convictions,[7] we know of no case that has come before this Court in which officers and employees of a nationally renowned corporation whose stock is publicly traded on the New York Stock Exchange have been charged with a RICO offense for conduct that was designed to benefit the corporation and was not otherwise "typical of the crimes

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[7] *See, e.g.*, *United States* v. *Barber*, 668 F.2d 778 (4th Cir.), *cert. denied*, 51 U.S.L.W. 3254 (Oct. 4, 1982); *United States* v. *Bagnariol*, 665 F.2d 877 (9th Cir. 1981), *cert. denied*, 102 S.Ct. 2040 (1982); *United States* v. *Welch*, 656 F.2d 1039 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1767 (1982); *United States* v. *Sutherland*, 656 F.2d 1181 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1451 (1982); *United States* v. *Angelilli*, 660 F.2d 23 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1442 (1982).

committed by persons involved in organized crime . . . as a major source of revenue and power for such organizations." *United States* v. *Turkette*, 452 U.S. 576, 590 (1981). Rather than permitting the prosecution to proceed to trial in this case, this Court should reverse the decision of the court of appeals and sustain dismissal of the RICO, mail fraud and wire fraud counts.

II

DISMISSAL OF THE INDICTMENT WITHOUT PREJUDICE WAS THE CORRECT REMEDY FOR THE REPEATED INVASIONS OF THE GRAND JURY

Rule 6(d) of the Federal Rules of Criminal Procedure is specific in enumerating those who may be present in the grand jury room during its proceedings, and the overwhelming weight of authority in federal courts is that a violation of Rule 6(d) is, in and of itself, reason for dismissal of the indictment. The decision of the court below refusing to apply a *per se* rule to invalidate any indictment returned by a grand jury penetrated by unauthorized invaders directly conflicts with the rule governing the Fifth and new Eleventh Circuits as announced in *United States* v. *Echols*, 542 F.2d 948, 951 (5th Cir. 1976), *cert. denied*, 431 U.S. 904 (1977). The *Echols* rule requiring dismissal *per se* is consistent with the overwhelming weight of federal authority, as described in the following conclusion drawn from eighteen cited federal court rulings in *United States* v. *Lill*, 511 F. Supp. 50, 58 (S.D.W.Va. 1980) (footnote and citations omitted):

> While there is a split of authority among the states as to whether the presence of an unauthorized person before a grand jury is *per se* prejudicial, thereby requiring dismissal of the indictment, federal decisions which have

addressed the point are, in the main, uniform in adhering to the *per se* rule.[8]

See also United States v. *Braniff Airways, Inc.*, 428 F. Supp. 579, 582-83 (W.D. Tex. 1977); *United States* v. *Bowdach*, 324 F. Supp. 123, 124 (S.D. Fla. 1971).

The record in this case showed that there were at least five unauthorized entries into the grand jury room while witnesses were testifying,[9] and that four of these intruders were persons "under the control of the United States Attorney." R. 126, Pet. App. C at 61a, *infra*. The district judge concluded that there had been "repeated, unreprimanded intrusions into the grand jury room of persons under the control of or acting for the convenience of the federal prosecutor." R. 127, Pet. App. C at 62a, *infra*. Consequently, he dismissed the indictment without prejudice, thereby leaving the prosecutors free to attempt to obtain a new indictment from an untainted grand jury.

The court of appeals refused to sustain this dismissal, although it concluded that the prosecutors "were obviously not diligent in keeping the sanctity of the grand jury room inviolate." Pet. App. A at 8a, *infra*. The court held that the

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[8] The *Lill* case concerned two government agents who testified together before the grand jury with regard to records they had reviewed that pertained to certain overt acts in a proposed indictment. The district court held that although there was neither actual prejudice nor any possibility of prejudice, "dismissal might well be decreed as the proper and prudent course" if the issue had arisen—as it has in this case—before trial. 511 F. Supp. at 61. Since it was first raised "after a three-month trial conducted at enormous expense to the United States and the defendants" (*id.*), the district court refused to disturb the convictions.

[9] The five intrusions were known as a result of pre-trial discovery, during which several grand jury transcripts were disclosed to the defense. The prosecutors refused to make any other transcripts available to the defendants but asserted, in an affidavit filed in the court of appeals, that there was only one other possible violation of the Rule.

prosecutors survived this legal challenge "by the skin of their teeth" merely because, in the court's view, the invasions were "rare, inadvertent and nonprejudicial." *Id.*[10] Besides conflicting with the *per se* rule that has been adopted throughout the federal system, the requirement that prejudice be shown—now unique to the Fourth Circuit—overlooks the harmful consequences of permitting dismissal to turn on whether the court finds prejudice. If a *per se* rule is not applied, the district court will be required to release to the petitioners previously secret grand jury transcripts[11] and hear testimony from the prosecutors, the intruders, the witnesses, and, most importantly, the grand jurors themselves. Such an extensive inquiry into the grand jury process would further undermine the policy of grand jury secrecy that underlies Rule 6(d) of the Federal Rules of Criminal Procedure.

Nor was the court of appeals correct in relying upon the duration of the entire grand jury investigation in determining

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[10] On this record, there is no way of knowing whether the intrusions were "rare" since only a small portion of the grand jury proceedings were disclosed. The conclusion that they were "inadvertent" is contradicted by the fact that the intruders were never reprimanded and that four of the five known intruders were under the prosecutors' control. The conclusion that the intrusions were nonprejudicial is unwarranted since there was no hearing as to prejudice in the district court.

[11] The first intrusion indicated by the portions of transcript made available to the defense in this case concerned an "unidentified woman" who entered the grand jury room and made "remarks . . . toward [the prosecutor] on an unrelated matter off the record." R. 133. The prosecutor then told the grand jurors that she had delivered "a document that was subpoenaed by this Grand Jury"—suggesting that it was not an "unrelated matter" that she had discussed with the prosecutor in the presence of the grand jurors. R. 133. Without further information as to what happened in later grand jury sessions as shown by the transcript, how can it be determined whether this unannounced entry and conversation was prejudicial?

whether the indictment should be dismissed. No other reported federal decision has considered this factor, and it is legally irrelevant. Once the grand jury's secrecy and independence have been violated, the invalidity of the resulting indictment does not depend on the practical effect upon, or convenience of, the prosecution. Moreover, in judging the potential consequences of dismissal, the court of appeals overlooked the fact that this was an investigatory grand jury, inquiring into many areas. Resubmission of relevant evidence to an untainted grand jury surely can be accomplished with dispatch. Consequently, dismissal of the indictment would not excessively disrupt the work of federal prosecutors or of the regular grand jury.

Conversely, it would be unfair to the petitioners and wasteful of federal judicial resources to demand that a trial be held before the question of grand jury intrusion is considered by this Court. If the grand jury proceeding were invalidated by the intrusions, the petitioners should not be forced to stand trial until there has been a proper grand jury proceeding. And, under the rationale of *United States* v. *Lill*, 511 F. Supp. 50, 61 (S.D.W. Va. 1980), the petitioners' claim, if valid now, may be lost after a long trial (*see* note 8 at 18, *supra*). That would obviously be unfair to the petitioners, who raised this issue at their earliest opportunity.

Finally, the court of appeals misunderstood and misapplied this Court's decision in *United States* v. *Morrison*, 449 U.S. 361 (1981), when it relied on the *Morrison* ruling as a basis for reversing the dismissal of the indictment. Pet. App. A at 6a, *infra*. This Court said in *Morrison* that dismissal of an indictment *with prejudice* is a "plainly inappropriate" remedy for the government's violation of an accused's Sixth Amendment right to the assistance of counsel. It held that the proper remedy "is limited to denying the prosecution the fruits of its transgression." 449 U.S. at 355-66.

In this situation, unlike that in *Morrison*, the prosecutors' transgression affected the integrity and validity of the grand

jury proceeding. The only way to deny the prosecution "the fruits of its transgression" is to require it to conduct a fresh proceeding before an untainted grand jury. The new grand jury proceeding is the equivalent of the new trials that were ordered in all the cases cited approvingly by this Court in its discussion of this point in its *Morrison* opinion (449 U.S. at 364-365): *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Geders* v. *United States*, 425 U.S. 80 (1976); *Herring* v. *New York*, 422 U.S. 853 (1975); *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Black* v. *United States*, 385 U.S. 26 (1966); *O'Brien* v. *United States*, 386 U.S. 345 (1967). Dismissal of the indictment without prejudice is the only effective means of vindicating the important interest in preserving the secrecy of grand jury proceedings. *Compare Rose* v. *Mitchell*, 443 U.S. 545, 557-558 (1979); *Hill* v. *Texas*, 316 U.S. 400, 406 (1943).

The court of appeals failed to perceive that the dismissal of the indictment in *Morrison* had been "with prejudice" (449 U.S. at 363), and that in *Morrison* this Court disapproved a remedy which would forever foreclose the criminal prosecution of an accused merely because the government agents had interfered with the accused's constitutional right to the assistance of counsel. The remedy granted by the district court in this case would have no such "drastic" (449 U.S. at 367) effect. Instead, the district court's dismissal of the indictment *without prejudice* came within this Court's instruction (449 U.S. at 365):

> to identify and then neutralize the taint by tailoring relief appropriate in the circumstances. . . .

It is important for the administration of federal criminal justice throughout the country that this misapplication of the *Morrison* decision be corrected. It is also important that grand juries in the Fourth Circuit be subject to no different rules than grand juries elsewhere in the federal system. The *per se* rule of dismissal whenever there has been a violation of Rule 6(d)—surely applicable to repeated and unreprimanded violations of the Rule by persons under control of the prosecutor—requires reversal of the judgment of the court of appeals.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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